U.S. Department of Labor

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Issue date: 14May2001

CASE NO.: 2000-LHC-1924

OWCP NO.: 1-146747

IN THE MATTER OF:

ERNEST AXSON
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insurer

APPEARANCES:

Scott N. Roberts, Esq.
For the Claimant

Mark W. Oberlatz, Esq.
For the Employer/Self-Insurer

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on December 11, 2000 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
RX 10	Deposition Notices Relating to the taking of the deposition of Dr. William A. Wainright	01/25/01
CX 7	Attorney Roberts' letter filing his status report	01/29/01
CX 8	Attorney Roberts' letter to Attorney Oberlatz advising that he will not be deposing Dr. Frank Jones	01/29/01
RX 11	Attorney Oberlatz's letter filing the	02/26/01
RX 12	February 12, 2001 Deposition Testimony of Dr. Wainright	02/26/01
RX 13	Attorney Oberlatz's letter requesting an extension of time to file the deposition testimony of Dr. Alessi	03/01/01
ALJ EX 9	This Court's **ORDER** granting that request	03/01/01
RX 14	Attorney Oberlatz's letter filing the	04/18/01
RX 15	January 22, 2001 Deposition Testimony of Dr. Anthony Alessi	04/18/01

The record was closed on April 18, 2001 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On March 22, 1996, Claimant suffered an injury in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on March 1, 2000.

7. The applicable average weekly wage is $1,076.02.

8. The Employer voluntarily and without an award has paid benefits for his permanent partial impairment of five (5%) percent impairment to the right hand and four (4%) percent to the left hand, pursuant to the rating of its medical expert, Dr. William A. Wainright. (RX 4, RX 7)

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. The date of his maximum medical improvement.

3. Entitlement to an award of medical benefits and interest on unpaid compensation benefits.

4. Entitlement to an attorney's fee and reimbursement of litigation expenses.

Summary of the Evidence

Ernest Axson, fifty-four (54) years of age, with an eleventh grade education but no GED and an employment history of manual labor began working in 1965 as a welder at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. He used various air-powered or pneumatic vibratory tools such as grinding machines and other such tools. He worked six months as a welder and he then went to work as a pipe coverer and he had duties of cutting and applying pipes with amosite asbestos. He did that work for two years and he used no

pneumatic tools as a pipe coverer. He was laid-off and transferred to work as a pipefitter and, in the performance of his assigned duties, he used band saws, wrenches and other vibratory tools, **inter alia**, to put etching or identification marks on the pipes. He did that work for two or three years, was laid-off in 1969 and collected unemployment benefits. (TR 15-20)

Claimant was rehired by the Employer in 1972 as a welder, left in 1973 to work elsewhere and was rehired in 1976, again as a welder. He worked all over the boats and he did mostly stick welding, although he did some steel welding, work that is also called structural steel welding. He daily used air-powered or pneumatic tools to clean his own welds so that the inspector would approve his welding work. He used such tools as burr machines, grinding wheels, so-called "whirly-birds" and "Murphy's," Claimant testifying that in the course of his eight (8) hour work day, he would use pneumatic tools three or four hours daily. In fact, he used a burr machine so often that he had his own machine that he kept in his tool bag all of the time. In 1991 he was transferred from pipe welding to tig welding and, in the performance of his assigned duties, he spent two-to-three hours daily using pneumatic, vibratory tools. (TR 20-26, 37-38)

On March 27, 1996 (or April of 1996) (TR 27) Claimant was laid-off and he went to Florida where he worked for about one year as a landscaper. He returned to Connecticut and delivered newspapers by van for six-to-seven months. He now works as a tank watcher for NGS at the Millstone Nuclear Power Plant, Waterford, Connecticut, as a so-called "rad. watcher" and has duties of monitoring an employee's exposure to radiation in those confined spaces. (TR 26-29)

Claimant began to experience bilateral hand/arm symptoms, such as being "especially cold in the winter" or whenever he had to handle cold objects, Claimant testifying that he had those symptoms while working at the shipyard. His hand/arm problems do not affect his current work for NGS but he cannot return to work at the shipyard because he has difficulty grasping and holding onto objects, a problem he also experienced while delivering newspapers. (TR 29-32)

Claimant has seen Dr. S. Pearce Browning, III, an orthopedic and hand surgeon, twice and, according to Claimant, the initial examination lasted forty-five to sixty minutes. He was sent to Vascular Associates for diagnostic testing and those November 5, 1999 test results are in evidence as CX 3. EMG studies performed by Dr. Anthony G. Alessi, a neurologist, are in evidence as CX 4. Dr. Alessi's exam lasted seventy-five to eighty minutes or so. Claimant, describing Dr. Browning's exam

as very thorough, testified that Dr. Wainright's exam, on the other hand lasted 10-15 minutes. (TR 32-37, 39)

In his October 8, 1999 report, Dr. Browning states as follows (CX 2):

"I saw Mr. Ernest Axson in the office on October 6, 1999. Mr. Axson is 52 years old, height 5'9", weight 224, black with black hair, and he's right-handed.

"He started at EB in 1965 and has some broken time in there with lay-off, and he returned a couple of times, and then he went back in 1976 and stayed there until 1996 when he was laid off. From 1965-67 he was a pipe fitter and used all air tools. From 1976 on, he was a welder.

"On system review, Mr. Axson wears glasses; he has had no trouble with the heart. He has been told that he has asbestosis. He has had no specific asthma or allergies. There has been no problem with the abdomen, GU system, blood pressure, diabetes, thyroid disease, anemia, phlebitis, rheumatoid arthritis, Lyme disease, gout or hernias.

"He complains of pain in the right shoulder and attributes this to repetitive carrying of heavy welding leads. He has not had any surgery. Other injuries at EB have been principally superficial burns.

"Outside of EB, he had a motor vehicle accident 4-6 months ago, which resulted in a sprain of the neck and he received chiropractic treatment for this.

"On physical exam, grasp right 80, left 77; pinch right 16, left 14. The pinwheel and light touch fade in the mid-palm. 256 Hertz is down right 20%, left 20%; 30 Hertz down right 30%, left down 30%. Two-point discrimination is right 7 5 7 7 5, left 7 9 7 7 7. His Allen's tests are trace right and left. Tinel's sign is negative. Phelan's test is positive at 15 seconds.

"The ambient temperatures are:

Right		Left	
1	34.6	1	35.3
2	34.6	2	35.5
3	35.4	3	35.2
4	34.9	4	35.5
5	35.5	5	35.4

"He also has a lateral epicondylitis. He can put the right shoulder all the way over his head, but it snaps on occasion. I can hear it snap and grind with a stethoscope, and my impression is that he has a tear of the rotator cuff, which is small because he is able to elevate the arm fully.

"The neck has been a bit stiff since the motor vehicle accident, but he apparently has some morning stiffness. This is probably due to the motor vehicle accident. I got a film of the neck. It has a slight lordotic curve and early changes at C5-6. I do not believe that based on my exam and the X-rays, the cervical spine is related to work but rather is related to the motor vehicle accident.

"This leaves the hands and the shoulder. If he has not had a shoulder reported, then a report should be made. The lateral epicondylitis which he has comes from the use the air tools and is part of the hand/arm vibration syndrome.

"The standard shoulder X-rays do not show any fracture, dislocation or bone lesion. To define this better, I need an MRI of the right shoulder to assess the status of the rotator cuff. I have not ordered this because I do not have a file number for it; I don't know whether National would like to include it under the number for the hands and arms. However, I will wait until you can get authorization from National Employers to go ahead with the shoulder MRI before ordering it.

"I plan to see Mr. Axson on December 13, 1999 to get everything together, but as soon as you have authorization for the MRI for the right shoulder, please call us and we will get it set up. Thank you very much."

In his supplemental progress report, Dr. Browning states as follows (**Id.**):

"12/13/99 Patient returns. He's out of EB, having left in 1996. Worked for a period of time in WalMart. He has not used air tools since leaving EB and has not really had much treatment for the shoulder.

"The neuromuscular side shows positive electrophysiologic changes. The vascular is not that bad. So, I will assign 15% to the right master hand, which is 10% neuromuscular, 5% vascular, and 20% to the left non-master hand, which is 15% neuromuscular, 5% vascular.

"In addition, I would suggest 5% of the right master arm because of the right shoulder injury. I think it would be worth while to review the situation in 3-5 years."

Dr. Browning reiterated his opinions at his November 20, 200 deposition (CX 6) and the doctor forthrightly and persuasively explained the protocol and methodology he uses to diagnose, evaluate and treat bilateral hand/arm vibration syndrome, that he disagrees with the evaluation by Dr. Wainright and the

medical records review by Dr. Jones. Dr. Browning, who has been Board-Certified as an Orthopedic Surgeon, testified on direct at pages 3-23 and the intense cross by Employer's counsel is at pages 23-36, and the doctor's opinions did not waver when confronted with that cross-examination.

The parties deposed Dr. Anthony Alessi on January 22, 2001 (RX 15) and the doctor forthrightly testified as to the protocol and methodology that he uses in performing the diagnostic testing of patients experiencing hand/arm problems, and the doctor's opinions did not waver in the face of intense cross-examination by Employer's counsel. The doctor's **Curriculum Vitae** is included as part of the doctor's transcript. (**Id.**)

The Employer referred Claimant for an examination by Dr. William A. Wainright, a specialist in hand surgery, and the doctor sent the following letter to the Employer's adjusting firm on April 10, 2000 (RX 6):

"HISTORY: This patient is a 53 year old man seen for Independent Medical Examination.[1] He states he is right hand dominant. He gives a work history of being employed for over 20 years at Electric Boat as a welder. He was laid off from Electric Boat in April of 1996. After leaving Electric Boat, he was employed at WalMart for a time. He did not use air-powered, vibrating tools. He has been laid off from WalMart and is now unemployed. His height is about five feet, nine inches. His weight is about 228 lbs. He denies any smoking history. He claims good general health. He denies diabetes mellitus. He denies thyroid disease. He denies Lyme disease. He has had history of symptoms in both hands that began while he worked at Electric Boat. His left hand is more involved than his right. He did have use of air-powered, vibrating tools including air-powered grinders and air-powered, burr machines.

"His medical records available for review begin with a letter from Dr. Pearce Browning to Attorney Scott Roberts dated October 8, 1999. Work history is documented. Work–up was ordered.

"The patient was seen at the Vascular Associates on November 5, 1999. Studies were interpreted by Dr. Tom Bell. Studies were felt to be normal. Pulse volume recordings in the digits were

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[1]Dr. Wainright's examination is not an IME within the intent and meaning of Section 7 of the Act (1) as Dr. Wainright was neither selected nor paid by the OWCP, (2) as this Employer routinely sends its employees who have filed such claims to Dr. Wainright and (3) as his extremely conservative ratings tend to favor and tilt towards this Employer. I note in passing that I have reviewed the doctor's reports for many years.

good. Initial temperatures in the fingers were good. Temperatures in the digits re-covered well after ice water challenge.

“Laboratory studies were done at the William W. Backus Hospital on November 7, 1999. Cold aggluntinins were negative. Thyroid profile was normal. There was mild elevation of T-uptake.

“The patient was seen at Neurology Associates on November 16, 1999. Weakness and numbness of the left hand and to a lesser extent the right hand were noted. Nerve conduction studies were done. They were felt to be consistent with a moderate, left, median mononeuropathy at the wrist and a mild, right median mononeuropathy at the wrist.

“The patient was seen by Dr. Browning on December 13, 1999. Disability rating was given.

“The patient presents in our office today complaining of numbness in the hands at nighttime. The left hand is more involved than the right. He has some component of morning stiffness and paresthesias. He complains of decreased grip strength in the hands. He notes cold sensitivity in the hands.

“EXAMINATION: On examination, there is excellent use pattern of the hands. There (are) no ulcerations in the fingertips. No edema is seen. Tinel sign over the carpal tunnels and cubital tunnels is negative. Elbow flexion test is negative bilaterally. Phalen’s test is mildly positive on the right and moderately positive on the left. Thenar strength is intact. No thenar atrophy. Allen’s testing shows good filling of the radial and ulnar arteries. Thoracic outlet stressing reproduces paresthesias in the little and ring fingers of the left hand. Cervical spine range of motion reproduces no radicular signs. Grip strength measures 85 on the right and 85 on the left. Two-point discrimination is intact. Values are six millimeters in the thumb, index, middle, ring and little digits.

“IMPRESSION: 53 year old black man with over 20-year work history at Electric Boat as a welder. He does have signs and symptoms compatible with peripheral nerve entrapment at the wrist level. His vascular testing is normal.

“He has no current work restrictions.

“He does have a 2% disability of each hand due to presumed vibratory white finger disease. In addition, he has a 3% disability of his right hand a 2% disability of his left hand due to presumed carpal tunnel syndrome.

“These problems are more likely than not related to the use of his hands while employed at Electric Boat.

“No pre-existing condition can be identified today making his current problems materially and substantially worse.”

In his September 7, 2000 supplemental report (RX 7), Dr. Wainright states as follows:

“Thank you for your letter of August 1th concerning Ernest Axson.

“I have reviewed the two-point discrimination findings in my office and compared them with Dr. Browning’s, as well as Ms. Leindecker’s. As you noted, the findings vary from examiner to examiner. In chapter 3, on page 20 of the AMA **Guides** under, Evaluating Sensory Loss of The Digits, it states that, “Any sensory loss or deficit that is believed to be (sic) to contribute to permanent impairment, must be unequivocal and permanent.” Certainly in my testing, with normal two-point discrimination there is no evidence of sensory loss due to abnormal two-point scores.

“Also, as we had discussed, Dr. Browning does not test at a six millimeter separation of two-point discrimination and, therefore, cannot tell if the patient’s values are at the upper limits of normal or not. Therefore, a value from Dr. Browning’s office of seven millimeters might just as easily have been six millimeters and within normal limits.

“I’m at a loss to explain why Ms. Leindecker’s values are increased compared to both Dr. Browning and myself. I think this speaks to the difficulty of accurate two-point discrimination testing, mainly because of the participation of the patient there is subjective interpretation of the stimulus,” according to the doctor.

Dr. Wainright reiterated his opinions at his February 12, 2001 deposition (RX 12) and even a cursory reading of the doctor’s testimony leads to the conclusion that his opinions tend to reflect a conservative reading of the AMA **Guides**, and I so find and conclude.

The Employer sent Claimant’s medical records to Frank E. Jones, M.D., and the doctor, a specialist in Musculo-Skeletal Evaluations and Orthopedic Second Opinions, states as follows in his May 28, 2000 letter to Employer’s counsel (RX 8):

“I have reviewed the medical records which you sent me in the case of Mr. Ernest Axson, File # 188701.

"Mr. Axson was evaluated by Dr. S. P. Browning on October 6, 1999, at the request of his lawyer, Mr. Scott Roberts. Dr. Browning did not record a specific history of Mr. Axson's complaints, but he did record a work history. Mr. Axson worked intermittently for Electric Boat Co. from 1976 (sic) to 1996.[2] Dr. Browning did not report finding any discrete muscle weakness, atrophy, or absent pulses in his hands. He found tenderness of both lateral epicondyles, but recorded no weakness or limitation of motion of the elbows. He had some crepitus of his right shoulder, but no limitation of motion. X-rays of his shoulder were normal. I find no record of any X-rays of his hands.

"Dr. Browning had vascular tests and electrodiagnostic tests done in November, 1999. Electrodiagnostic studies were interpreted by Dr. Anthony Alessi. All EMG studies of both hands were normal. On the right, his median distal sensory latency peak was 3.6 ms., and on the left, it was 3.9 ms. Normal value for this test is 2.5 to 3.7 ms. On the left, his median distal motor latency was 3.3 ms., and on the right, it was not tested. Normal value for this test is 2.4 to 4.4 ms. Dr. Alessi concluded that there was evidence that he had bilateral median neuropathy. I do not see how Dr. Alessi came to this conclusion, since the findings on the right are normal by Dr. Alessi's own standards.

"Vascular tests were interpreted by Dr. Bell. The vascular tests showed 'an essentially normal upper arterial exam, including pressures, thoracic outlet, and cold stress challenge.'

"Mr. Axson was examined by Dr. William Wainright on February 14, 2000. Dr. Wainright reported that there was excellent use patterns evident in both hands. There was no ulceration or atrophy of the fingers. Phalen's test was positive on both sides. Allen's test showed good filling of the radial and ulnar arteries bilaterally. There was no motor weakness of the intrinsic or extrinsic muscles. There was two-point discrimination of 5 mm. in all fingers of both hands.

"As far as the impairment rating for his vascular disease, the AMA **Guides** address this in Table 17, page 57. Nowhere in Mr. Axson's medical records that I had for review is there any mention of any physical findings of vascular disease, and his vascular tests are normal. There is no evidence to support a diagnosis of vascular disease, and I find no impairment due to vascular disease.

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[2]Claimant began working at the shipyard in 1965 and has at least twenty (20) years of service with the Employer.

"There are no abnormalities on Mr. Axson's neurological examination. Dr. Alessi interpreted the electrodiagnostic tests as showing neuropathy of both median nerves at the wrist, but the recorded tests do not confirm this diagnosis. If one goes strictly by the 4th edition of the AMA **Guides**, there is no impairment given for carpal tunnel syndrome if there is no permanent loss of neurologic function. Table 16, p. 57 refers to degree of loss of nerve function. This table has frequently been misinterpreted. Mild, moderate, and severe are not defined in the text. We have recognized that the intent of this table is unclear, and we have taken steps to clarify it. The AMA published a companion book to the **Guides**, entitled **The Guides Casebook**, published by the AMA in 1999. Interpretation of table 16 is discussed in pages 53 to 65. In the **Casebook**, it is clarified that mild, moderate, and severe refer to degree of nerve dysfunction. Severe is reserved for nerve damage which causes complete loss of sensibility and motor function. Table 16 will be removed from the 5th edition of the AMA **Guides**, and entrapment neuropathy will be rated in the same way as any other neuropathy. In practice, most evaluators do give a small impairment rating in these cases, and I would rate Mr. Axson's impairment as 4% of the left upper extremity as a result of his median neuropathy.

"There is no evidence on which to base a diagnosis of median neuropathy on the right. Dr. Wainright found no abnormalities on neurological examination, and Dr. Alessi's tests showed no abnormality on electrodiagnostic testing. In my opinion, there is no impairment based on carpal tunnel syndrome on the right.

"There is no evidence in the records I was furnished for review to support an impairment of his right shoulder. There is no history of work-related injury to his shoulder. Dr. Browning found no limitation of motion in his shoulder. X-rays of his shoulder were normal. He apparently did not complain of his shoulder to Dr. Wainright, and Dr. Wainright did not evaluate his shoulder.

"Based on the records I was furnished for review, I find impairment of 4% of the left upper extremity due to carpal tunnel syndrome. I am unable to say what part of this impairment, if any, might be due to his work for Electric Boat.

"In my opinion, Dr. Browning's rating of 15% and 20% of his hands is excessive, given the fact that Mr. Axson's physical examination is essentially normal, and his impairment is based on subtle changes on laboratory testing. 20% of the hand is what the AMA **Guides** would rate someone who has had a complete traumatic amputation of the index finger."

Ms. Kathryn Leindecker, OTR/L, CHT, of Shoreline Physical

Therapy Services, states as follows in her July 6, 2000 letter to Employer's counsel in a document entitled **Occupational Therapy Evaluation Two Point Sensory Discrimination** (RX 9):

Occupational Therapy Evaluation
Two Point Sensory Discrimination

Attention: James Rondeau
Date: July 6, 2000
Name: Ernest Axson

"**Current Occupation/Employer:** Driver/Delivery-Electric Boat
"**Past Occupation/Employer:** Welder/Electric Boat

"**Patient History:** Mr. Axson is a 53-year old who was employed at Electric Boat as a welder for nearly 20 years until his layoff in 1996. He reports a 4-year history of numbness, pins and needles sensations in both hands. Symptoms are brought on primarily at night and with certain positions of the arms such as over head. Functionally he reports being unable to use vibrating tools otherwise symptoms do not interfere with work or ADL's.

"**Objective Findings:** Static two point discrimination testing was performed with the Mackinnon Dellon Disk-Criminator. All digits of both hands were tested following the standard protocol recommended by ASHT. A value is assigned once 7 out of 10 consistent responses are elicited.

Mr. Axson demonstrated consistent responses in 9 out of 10 digits tested meeting the 70% established criteria. The left thumb was scored at 60% accuracty. Nine out of ten digits were found to be mildly to moderately impaired. Only the left middle digit was found to have two-point sensation that was within normal limits as follows: right-12,11,12,12,11mm and left-8,12,6,10,12mm (please see attached).

"**Clinical Observations:** There was no scar or deformities. No excessive callus noted," according to Ms. Leindecker.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain**

Trimmers Association, Inc., 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer’s burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit held that an employer need not rule out any possible causal relationship between a claimant’s employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id.**, 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim “in the absence of substantial evidence to the contrary.” 33 U.S.C.

§920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to negate the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that Claimant's credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's credible testimony to establish that he experienced a work-related harm, and as it is undisputed that working condition existed that could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the

employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The probative testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his bilateral carpal tunnel syndrom (CTS) and his hand/arm vibration syndrome (HAVS), resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment as all of the doctors are in agreement on the etiology of such bilateral hand/arm problems and as they differ only on the extent of the impairment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation

of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszie wicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant’s daily use of air-powered or pneumatic vibratory tools for approximately twenty (20) years as a maritime employee has resulted in bilateral hand/arm problems

diagnosed as hand/arm vibration syndrome ("HAVS"), that the date of injury is October 6, 1999 (CX 2), that Claimant had filed a protective claim for benefits by form dated May 4, 1999 (CX 1B and that the Employer timely controverted Claimant's entitlement to benefits by form dated May 25, 1999. (RX 2) Thus, the principal issue is the nature and extent of Claimant's permanent partial impairment, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982),

or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem**., 617 F.2d 292 (5th Cir. 1982).

On the basis of the totality of the record, I find and conclude that Claimant has been permanently and partially disabled from December 13, 1999, according to the well-reasoned opinion of Dr. Browning, and as the doctor issued his impairment ratings at that time. (CX 2)

On the basis of the totality of this closed record, this Administrative Law Judge, having reviewed the entire record, finds and concludes that the opinion of Dr. Browning is well-reasoned and well-documented and best effectuates the purposes of this beneficent and humanitarian statute.

Initially, I note that the Longshore Act does not require that permanent partial disability be based on the **AMA Guides**, except in two circumstances: hearing loss and occupational disease claims by retirees. 33 U.S.C. §902(10) 908(c)(13)(E), (c)(23) The Benefits Review Board has explicitly held that an Administrative Law Judge is not required to use the **AMA Guides**. **Mazze v. Frank J. Holleran, Inc.**, 9 BRBS 1053 (1978). Indeed, the term "permanent impairment," which is the central concept in the **Guides**' rating system, is not even used in the Longshore Act. Rather, the Act speaks in terms of awards for permanent partial "disability" and provides for a proportionate award when there has been a partial loss or partial loss of use. The broader language has led the Benefits Review Board to acknowledge that an Administrative Law Judge has the authority

to look at all of the evidence concerning the impact that an injury has had on an individual's earning capacity and has accorded Administrative Law Judges significant discretion in determining the proper percentage for loss of use. **Michael v. Sun Shipbuilding & Drydock Co.**, 7 BRBS 5 (1977).

Moreover, the Board has also recognized the effect that chronic pain plays in an individual who has sustained a so-called schedule injury as a result of a covered work-related injury and, in appropriate factual circumstances, has permitted an ongoing award of permanent partial disability benefits, pursuant to Section 8(c)(21) of the Act. In this regard, **see Frye v. PEPCO**, 21 BRBS 194 (1988).[3]

It is apparent that Dr. Browning, Dr. Wainright and Dr. Jones recognize the limitations of the **Guides** as they apply to cumulative trauma types of injuries, and injuries where chronic pain significantly limits the individual's work capacity. The difference between the opinions, though, is that Dr. Wainright and Dr. Jones leave the discussion there. They concede that their numerical ratings do not reflect any pain-related disability that was found by Dr. Wainright. As noted above, Dr. Jones merely did a medical records review and, as noted, had an incomplete employment history report. Dr. Browning's rating, which is the higher rating, explicitly reflects the impact of the injury as a whole on his long-term work capacity. Consequently, it is the better and more reliable evaluation of the impact of the injury, and I so find and conclude.

The fact that Claimant has been able to continue working intermittently within his permanent limitations does not alter the fact that this injury has had an impact on his work capacity. Also, his job opportunities are very limited by the fact that he cannot do anything but the lightest work with his arms and cannot do any repetitive hand motion. He even had difficulty delivering newspapers by van.

Dr. Browning has been Claimant's treating orthopedist since at least October 6, 1999 (CX 2), has followed a disciplined approach to impairment[4] evaluation and has provided an impairment rating which takes into account the impact that Claimant's daily

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[3]**See also Bass v. Broadway Maintenance**, 28 BRBS 11, 16-17 (1994).

[4]**Frye** is being cited herein only with reference to the added impairment being added to Claimant's daily activities due to his chronic daily pain. There is no Section 8(c)(21) claim herein, and this closed record does not establish, at this time, a loss of wage-earning capacity.

chronic pain and his inability to perform his regular work at the shipyard. Thus, Dr. Browning's is the more well-reasoned and the more well-documented opinion in this closed record.

I cannot accept the Employer's essential thesis that I should strictly apply the **Guides** herein because they are an **objective** method of evaluating permanent impairment. I disagree because it is that **objective** aspect which does not, and cannot take into account, Claimant's daily chronic pain, a condition which affects his daily living and prevents him from returning to his former higher paying work. Claimant's current Employer has provided Claimant with work that he can perform.

While I am most impressed with the professional qualifications of Dr. Wainright and Dr. Jones, and I have accepted and credited their opinions in other matters over which I have presided, I simply cannot accept their opinions in this case for the foregoing reasons. Furthermore, this Administrative Law Judge, in his discretion, may give greater weight to the opinions of the Claimant's treating physician, and I do so in this case to effectuate the purposes of the Act because, in my judgment, the automatic application, or by rote, if you will, of the **Guides** will do a manifest injustice to the Claimant. In this regard, **see Amos v. Director, OWCP**, 153 F.3d 1053 (9th Cir. 1998), 164 F.3d 480, 32 BRBS 144 (9th Cir. 1999); **see also** 153 F.3d 1052 (9th Cir. 1998); **Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

Accordingly, I find and conclude that Claimant's disability can be reasonably rated at fifteen (15%) percent permanent partial impairment of the right hand and at twenty (20%) percent permanent partial impairment of the left hand, pursuant to Section 8(c)(3) of the Act.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20

BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to benefits. (RX 2) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on or about May 11, 1999 (RX 2) and requested appropriate medical care and treatment. However, the Employer did not

accept the claim completely and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after March 1, 2000, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed within thirty (30) days of receipt of this decision and the Employer shall have fourteen (14) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to Claimant compensation for his fifteen (15%) percent permanent partial disability of the right hand and for his twenty (20%) permanent partial impairment of the left hand, based upon his average weekly wage of $1,076.02, such compensation to be computed in accordance with Section 8(c)(3) of the Act, and such benefits shall begin on December 13, 1999, the date on which Dr. Browning issued him impairment ratings.

2. The Employer shall receive credit for that amount of compensation previously paid to the Claimant as a result of his October 6, 1999 injury.

3. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, commencing on May 11, 1999 (RX 1), subject to the provisions of Section 7 of the Act.

5. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on March 1, 2001.

A
DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts
DWD:jl